APPENDIX A — *BUSH RANCH II:* CONSENT ORDER AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, COLUMBUS DIVISION DATED AND FILED DECEMBER 31, 1998

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

CIVIL ACTION FILE
NO. 4:95-CV-36(HL)

IN RE: E.I. duPont de Nemours & Company — Benlate Litigation:

THE BUSH RANCH, INC., a Georgia corporation, and WILLIAM R. LAWSON, individually,

YELLOW RIVER GROWERS, a partnership whose partners are Roy Phillip Barber, Carol H. Barber and Gregory Phillip Barber, and ROY PHILLIP BARBER and CAROL H. BARBER, and

C. RAKER & SONS, INC., a Michigan corporation,

Petitioners,

vs.

E.I. DU PONT DE NEMOURS & COMPANY, a Delaware corporation,

Respondent.

CONSENT ORDER AND FINAL JUDGMENT

Appendix A

WHEREAS, this proceeding was initiated on March 22, 1995 by a civil Petition to Show Cause (the "Petition") why respondent E.I. du Pont de Nemours & Company ("DuPont") should not be sanctioned for alleged litigation misconduct in certain product liability cases that were tried and later settled and dismissed in 1993 ("*Bush Ranch I*");

WHEREAS, DuPont denies any misconduct and all other allegations in the Petition and related proceedings;

WHEREAS, the Court held a hearing on the allegations of the Petition between May 2, 1995 and May 12, 1995 and issued an Opinion and Order on August 21, 1995 that imposed certain sanctions on DuPont;

WHEREAS, in *E.I. duPont de Nemours & Company — Benlate Litigation*, 99 F.3d 363 (11th Cir. 1996), *cert. denied*, 118 S.Ct. 263 (1997), the Eleventh Circuit vacated the Court's order and remanded the case for further proceedings consistent with its opinion;

WHEREAS, on remand, this Court has reviewed the record of the 1995 show cause proceeding;

WHEREAS, this Court entered an order on November 4, 1998 directing the United States Attorney for the Middle District of Georgia to investigate the allegations of the Petition and to determine by January 4, 1999 whether an Order to Show Cause should be entered commencing criminal contempt proceedings for alleged litigation misconduct in *Bush Ranch I*;

Appendix A

WHEREAS, the Court has consulted with the parties and has met with the United States Attorney for the Middle District of Georgia, and the Court has determined that the entire matter can be fully resolved in this civil proceeding in the manner set forth herein;

WHEREAS, the law firm of Alston & Bird acted as counsel of record for DuPont in *Bush Ranch I* and consents to participating in this civil action for the purpose of effectuating the relief set forth herein; and

WHEREAS, Alston & Bird denies any misconduct and all other allegations in the Petition and related proceedings, but acknowledges for itself a fundamental misunderstanding of the intent of the Court's discovery requirements in the *Bush Ranch I* proceedings and that such misunderstanding provided sufficient grounds for the investigation by the Court.

NOW, THEREFORE, it is hereby ORDERED that all claims and charges arising out of the transactions and occurrences alleged in the Petition are hereby dismissed with prejudice and fully satisfied by the following payments and actions:

1. DuPont has agreed to provide funding for certain legal education programs described herein and for that purpose has agreed to pay the sum of $11,000,000.00, contemporaneously with the entry of this order, into an escrow account at Sun Trust Bank in Macon, Georgia, to be disbursed by an escrow agent acceptable to the Court on specific terms subject to approval by the Court in the following amounts:

Appendix A

a. $2,500,000 each to the law schools at the University of Georgia, Georgia State University, Emory University, and Mercer University to enable each to endow a professorial chair, the exact title of which shall be determined by the Court and which generally shall be devoted to fostering and teaching professionalism and ethics in the practice of law.

b. $1,000,000 to endow an annual symposium on professionalism and ethics in the practice of law to be organized and hosted on a rotating basis by each of the law schools named above in paragraph 1.a or such other institutions as may be approved by the Court upon such terms as may be approved by the Court.

2. Alston & Bird has agreed to and shall pay the sum of $250,000 to the Commission on Professionalism of the Chief Justice of the Supreme Court of Georgia, to be used by that organization, subject to the approval of this Court, for furthering the goals of enhancing the professionalism of the practicing bar of Georgia.

3. DuPont has agreed to pay and Petitioners have agreed to accept an amount approved by the Court for Petitioners' costs and attorneys' fees incurred in prosecuting the Petition and Petitioners and their counsel have agreed fully to release any and all claims or obligations, known or unknown, arising out of or relating in any way to the transactions or

occurrences set forth in the Petition. This amount shall be paid upon the execution and delivery of the releases.

4. This Order terminates this case and all proceedings relating thereto, including the show cause proceedings referenced in the Court's November 4, 1998 order, and constitutes a Final Judgment within the meaning of Federal Rule of Civil Procedure 54(a), provided, however, that the Court shall retain such jurisdiction as it may deem necessary to oversee the implementation of the programs described in paragraphs 1 and 2, above.

SO ORDERED, this 31st day of December, 1998.

s/ Hugh Lawson
HUGH LAWSON, JUDGE

Appendix A

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APPENDIX B — *BUSH RANCH II:* ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, COLUMBUS DIVISION DATED AND FILED JANUARY 15, 1999

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA COLUMBUS DIVISION

Civil Action No. 4:95-cv-36 (HL)

In re: E.I. DuPont de Nemours & Co. Benlate Litigation

THE BUSH RANCH, INC., a Georgia Corporation, and WILLIAM R. LAWSON, Individually;

YELLOW RIVER GROWERS, a partnership whose partners are Roy Phillip Barber, Carol H. Barber, and Gregory Phillip Barber, and ROY PHILLIP BARBER and CAROL H. BARBER; and

C. RAKER & SONS, INC., a Michigan Corporation,

Petitioners,

v.

E. I. DuPont de NEMOURS & COMPANY, a Delaware Corporation,

Respondent.

ORDER

Appendix B

Before the Court is a Motion to Intervene filed on behalf of several individuals and nurseries who were plaintiffs in Benlate product liability lawsuits previously filed against Respondent in this case, E.I. DuPont De Nemours & Co. ("DuPont"). The Intervenor Applicants have moved to intervene for the purpose of objecting to the Consent Order and Final Judgment dated December 31, 1998, and seek to submit for the Court's consideration a Motion to Alter or Amend Judgment. For the reasons set forth below, the Motion to Intervene is hereby **DENIED**.

A. Background

This case was initiated on March 22, 1995, as a Petition filed on behalf of three nurseries and their owners, all of whom were plaintiffs in previous lawsuits in this Court. The previous lawsuits were brought as product liability claims against DuPont, and alleged that a fungicide (Benlate 50DF) produced by DuPont was defective in that it was contaminated with highly toxic herbicides known as sulfonylureas ("SUs"). These lawsuits were among 14 consolidated cases brought against DuPont and, along with a fourth lawsuit, were the lead cases in the Benlate litigation and commonly referred to as the "Bush Ranch cases" (hereinafter *Bush Ranch I*). Intervenor Applicants here were plaintiffs in the 14 consolidated cases; their cases were settled along with the cases of Petitioners.

Because the primary allegations made against DuPont in *Bush Ranch I* centered around the question of whether the Benlate 50DF contained contaminants which caused damage to the plants, soils, and waters at the *Bush Ranch I*

plaintiffs' nurseries, major portions of the discovery in these cases focused on identifying potential contaminants in the soils and waters. And, as with any product liability case, expert testimony was crucial to the development of each party's case. Of particular significance to this case were the tests done in June of 1993 by Alta Laboratories, Inc. on soil and water collected at plaintiffs' nurseries. The Alta Laboratories were engaged by DuPont because they were able to perform sophisticated analytical tests which few other laboratories could perform. For the purpose of the Alta testing, DuPont representatives were permitted to inspect plaintiffs' properties and collect soil samples. In return, DuPont agreed to produce all documents generated as a result of the inspection and testing and which were not subject to attorney work product claims. The question of whether DuPont wilfully failed to produce discoverable documents generated by the Alta Laboratories testing in *Bush Ranch I* formed the heart of this case.

In the pleadings filed in this case, Petitioners alleged that the test data and documents generated by the scientists at Alta Laboratories for *Bush Ranch I* disclosed the presence of SUs in Petitioners' soils and waters and that counsel for DuPont knew of these test results yet deliberately withheld from Petitioners the test data and documents which would have revealed them. Petitioners further alleged that counsel for DuPont directed Alta Laboratories scientists to make changes to the reports they prepared on the results of the tests of Petitioners' soils and waters and that these changes resulted in misleading results about the presence of SUs. Additionally, Petitioners alleged that after counsel for DuPont directed the Alta Laboratories scientists to retest

the samples, they used larger samples and homogenized the soil. Petitioners contended that only a final, "sanitized" version of the test results, showing "no detects" of contaminants at a 50 parts per trillion detection level, was given to DuPont's expert, Nicolas Albergo. Albergo subsequently testified at trial that DuPont found no evidence of SU contamination in Petitioners' soils and waters.

In bringing their Petition, Petitioners maintained that DuPont was obligated to produce to them the raw data from the Alta Laboratories and that DuPont's failure to produce the documents prevented Petitioners from fully and fairly presenting their claims at the *Bush Ranch I* trial. Despite these contentions, however, Petitioners specifically requested that they be allowed to continue to rely on the settlement agreements which they entered into with DuPont before a jury verdict was obtained in *Bush Ranch I*. Instead, Petitioners requested that DuPont be sanctioned for participating in a fraud upon the court. Petitioners also requested an award of attorneys' fees and costs for their prosecution of the Petition.

After the Petition was filed, the district court entered a Show Cause Order, directing DuPont to explain why the prayers of the Petition should not be granted and to explain why sanctions should not be imposed upon them. After various motions were filed by DuPont and entertained by the district court, a hearing was commenced for the purpose of determining the veracity of the allegations contained in the Petition. The hearing took up seven days of an eleven-day period between May 2, 1995 and May 12, 1995. Petitioners were active participants in all of these proceedings.

Appendix B

On August 21, 1995, the district court entered a lengthy order making detailed findings about the conduct of DuPont in the Bush Ranch cases, particularly with regard to the Alta Laboratories data and test results. *In re E.I. DuPont De Nemours & Co. — Benlate Litigation*, 918 F. Supp. 1524 (M.D. Ga. 1995). The district court found that DuPont wilfully and deceitfully engaged in conduct which "affected the fairness of the trial and prevented the full and fair presentation and consideration of the evidence." *In re Benlate Litigation*, 918 F. Supp. at 1556. The district court directed DuPont to pay sanctions in the sum of $114,687,675.06. DuPont appealed the decision of the district court to the Eleventh Circuit. Petitioners participated in the appeal of this litigation.

Concluding that the contempt sanctions imposed on DuPont were criminal in nature, but that insufficient procedural protections had been provided to DuPont prior to the imposition of sanctions, the Eleventh Circuit reversed the contempt order entered by the district court and remanded the case for further proceedings. *In re E.I. DuPont de Nemours & Co. — Benlate Litigation*, 99 F.3d 363 (11th Cir. 1996). Thereafter, the case was reassigned to the undersigned judge. A status conference was held, during which the parties, including Petitioners, offered their opinions as to how the Court should proceed. The Court then took under advisement the question of what procedures should be followed on remand.

On November 4, 1998, for reasons that are more fully discussed below, the Court directed that the matter should proceed in a criminal context, and requested the United

States Attorney for the Middle District of Georgia, acting on behalf of the Court for purposes of the contempt allegations, to investigate the matter to determine if there were sufficient facts to initiate a show cause order and to continue to prosecute the matter under a criminal heading. Before the United States Attorney completed its investigation for the Court, however, the parties met specifically for the purpose of discussing settlement. At the settlement conference, in which all parties identified in the Petition were represented by counsel, the parties reached a resolution of the matter, which is reflected in the Consent Order and Judgment entered on December 31, 1998, Under the terms of the Order, DuPont was directed to pay $11,000,000 to fund certain specified educational programs and further agreed to pay Petitioners for their costs and attorneys' fees incurred in prosecuting the Petition. Intervenor Applicants, whose lawsuits against DuPont were settled along with the lawsuits of Petitioners in this case, now seek to intervene for the purpose of challenging the settlement that was reached by the parties and which is memorialized in the Order of December 31, 1998.

B. The Motion to Intervene

In support of their Motion, Intervenor Applicants claim they have an interest identical to the interests of Petitioners here and that those interests were not adequately protected by Petitioners. Intervenor Applicants further contend their interests were impaired by the Court's "settlement with costs and attorneys' fees paid to only three of the fourteen parties directly injured by the transactions and occurrences set forth in the Petition." (Mem. Law Supp. Intervenor Applicants'

Mots. at 7.) Intervenor Applicants also express their concern that the "general public's impression of the conversion of a criminal contempt investigation into a civil settlement is that DuPont bought its way out of facing criminal contempt charges." (Mem. Law Supp. Intervenor Applicants' Mots. at 6.) Intervenor Applicants seek to remedy these perceived wrongs. In the Court's view, however, Intervenor Applicants misapprehend the role of Petitioners, the nature of the contempt Petition, and the settlement that resulted from it.

In the Petition which initiated this proceeding, Petitioners asserted that they were seeking to call to the Court's attention a fraudulent scheme conducted by DuPont for the purpose of concealing and suppressing evidence of the presence of SUs in the soils and waters of the *Bush Ranch* litigants' nurseries. Petitioners asked the Court to invoke its inherent powers to sanction DuPont for its conduct. Petitioners also specifically requested that they be allowed to continue to rely on the settlement agreements obtained in *Bush Ranch I*, and asserted that their purpose in bringing the Petition was not to reopen the litigation, but to sanction DuPont for the wrongs committed against the Court. Specifically, Petitioners asked that sanctions be imposed against DuPont "for its fraud on this Court, obstruction of justice, and disobedience of this Court's Discovery Orders." (Pet. at 9.) Petitioners repeatedly expressed that they were not seeking to undo the settlements obtained during the course of *Bush Ranch I*, but sought, instead, to have the Court sanction DuPont for "defiling the integrity of this Court" and for its "disobedience of this Court's orders" and "to correct other bad faith misconduct by DuPont and its agents." (Pet. at 8.)

Appendix B

Although the district court was not bound by the requests of the Petitioners in deciding how to proceed against DuPont for its alleged fraud on the Court, the district court, in its Show Cause Order, specifically directed that DuPont appear and show cause why the prayers of the Petition should not be granted. The district court had the authority "to vacate its earlier judgment . . . and to resume proceedings on the same jurisdictional basis as it possessed in the underlying case." *In re Benlate Litigation*, 99 F.3d at 367 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991)). Moreover, "the district court did have the power to set aside the settlement agreement and re-open the discovery portion of the earlier case." *In re Benlate Litigation*, 99 F.3d at 369 (citing *Chambers*, 501 U.S. at 44). Despite the availability of these options, the district court did not exercise its authority to set aside the settlements or reopen the litigation. Neither the district court, nor the Petitioners, were looking to take remedial measures affecting the underlying cases. Rather, both the Petitioners and the district court were looking to "vindicate the authority of the court" from the outset of the proceeding. Thus, the crux of the Petition has always been the injury to the Court resulting from DuPont's alleged contempt of its authority.[1]

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1. Had the plaintiffs in *Bush Ranch I* desired to pursue claims against DuPont for their alleged injuries resulting from DuPont's handling of the discovery in this case, they had the option of rescinding the settlement contracts which they entered into with DuPont and suing for the alleged fraud. Neither the Petitioners nor Intervenor Applicants elected to pursue these remedies. *See generally Kobatake v. E.I. DuPont De Nemours and Co.*, Nos. 97-8899 and 97-8914 (11th Cir. Dec. 3, 1998).

Appendix B

Given that the focus of the Petition was to "vindicate the authority of the court," rather than to serve as a vehicle for Petitioners or other litigants to remedy the injuries they allegedly sustained as a result of DuPont's handling of discovery in *Bush Ranch I*, the Court is of the opinion that the intended purpose of the Petition has been fulfilled. The Court is satisfied that its authority has been vindicated by the payment of $11,000,000, which will be used to promote educational programs designed to foster professionalism and ethics in the practice of law. Petitioners' stated goals of calling the Court's attention to a potential fraud and protecting the integrity of the Court have been achieved. The payment of $11,000,000 by DuPont constitutes some recognition of a problem with the handling of the *Bush Ranch I* litigation, even if the label of "sanction" is not applied to the payment.

Despite this result, Intervenor Applicants maintain that "[w]hen the investigation into criminal contempt directed by the November 4, 1998 Order was converted into a civil settlement," their interests were impaired and further express the concern that "[t]he general public's impression of the conversion of a criminal contempt investigation into a civil settlement is that DuPont bought its way out of facing criminal contempt charges." (Mem. Law Supp. Intervenor Applicants' Mots. at 6, 7.) Implicit in Intervenor Applicants' Motion, therefore, is the suggestion that final resolution of this matter can not be obtained unless a "criminal" label has been appended to the final proceeding. The Court disagrees with this suggestion, however.

The suggestion put forth by Intervenor Applicants that their interests were impaired by the Court's decision to

resolve this matter without resort to a full-scale criminal proceeding stems from a misunderstanding of the nature of contempt proceedings generally. A contempt proceeding is an amorphous process, not easily categorized as either civil or criminal in nature. The designation of a contempt proceeding as "civil" or "criminal" is more often done after the fact than within the proceeding itself: " '[C]onclusions about the civil or criminal nature of a contempt sanction are properly drawn, not from the subjective intent of [the court imposing the sanction], but from an examination of the character of the relief itself.' " *Benlate Litigation*, 99 F.3d at 368 (quoting *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 828 (1994)). The labeling of a contempt as civil or criminal is not significant. It is instead the question of what procedures are to be afforded to a contemnor before sanctions are imposed that is critical to a contempt proceeding. In the absence of these procedural protections (which conform to those provided in criminal cases), a court is limited in the types of penalties that can be imposed or the amount of sanctions that can be assessed.

In pursuing this matter against DuPont during the initial district court proceedings, the district court did not categorize the contempt as either civil or criminal in nature, but imposed an enormous sanction within the context of a civil proceeding. Following the appeal of this case, the Eleventh Circuit determined that the sanctions imposed against DuPont "were overwhelmingly punitive — and thus criminal — in nature" and, because the appropriate procedural protections to be afforded in a criminal contempt were not provided to DuPont, reversed and remanded the

case. *In re Benlate Litigation*, 99 F.3d at 368. Thus, consistent with many contempt cases, this case gained a "criminal" designation after the fact.

In considering how to proceed following remand, this Court looked at several factors, particularly the amount of sanctions potentially involved should a finding of wrongdoing be made, and concluded that the proper course of action was to proceed in a criminal context, giving DuPont the opportunity to respond to the charges made against it with all of the appropriate protections in place, including the presumption of innocence, the requirement that proof of guilt be established beyond a reasonable doubt, the opportunity to call witnesses in its defense, and the right to assistance of counsel. *See generally Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798-99 (1987). Consistent with these conclusions, the Court entered the Order of November 4, 1998, requesting that the United States Attorney investigate and prosecute the matter on behalf of the Court. Having thus requested the investigation on its behalf, the Court was also at liberty to terminate the investigation after determining that the matter could be resolved outside of the criminal realm.

This case became a criminal contempt because the potential sanctions to be imposed upon DuPont were so great that it would have been clear error to have given DuPont anything less than all of the procedural rights afforded to a defendant in a criminal case, which necessarily included written notice of the facts giving rise to the charges, as determined by an independent body — in this case the United States Attorney. That DuPont, the Petitioners and

the Court ultimately reached a resolution in this matter without resort to a criminal trial does not in any way lessen the fact that the Court's authority has been vindicated. Nor does it provide a basis for intervention by the Applicants in this case.

Related to their contentions that this case was improperly converted to a "civil settlement," Intervenor Applicants take exception to the fact that the "subject Consent Order approves of a settlement with costs and attorneys' fees paid to only three of the fourteen parties directly injured by the transactions and occurrences set forth in the Petition." (Mem. Law Supp. Intervenor Applicants' Mots. at 7.) The Court finds this exception to be based on a misapprehension of the terms of the settlement in this case. Although several plaintiffs were involved in *Bush Ranch I*, only three of those plaintiffs were named as Petitioners in this litigation and their involvement was extensive. Thus, the three Petitioners in this case had interests which were different from those interests identified by Intervenor Applicants here. As the Order of December 31, 1998 states: "DuPont has agreed to pay and Petitioners have agreed to accept an amount approved by the Court for Petitioners' costs and attorneys' fees incurred in prosecuting the Petition and Petitioners and their counsel have agreed fully to release any and all claims or obligations, known or unknown, arising out of or relating in any way to the transactions or occurrences set forth in the Petition." (Consent Order and Final Judgment at 4.) The payment made by DuPont to Petitioners served as payment for their costs in prosecuting the Petition, not as additional payment for the claims pursued by them in *Bush Ranch I*. Therefore, Intervenor

Applicants' request to intervene on the basis of the payment made to Petitioners is without merit.

Underlying all of Intervenor Applicants' arguments is the suggestion that they are entitled to monetary compensation because of DuPont's handling of the discovery in *Bush Ranch I*, and that this contempt proceeding is the means by which that compensation should be received.[2] While the Court does not dispute that it had the discretion to direct that monies be paid directly to the litigants, if the circumstances so warranted, no such payments were necessary to effect a final resolution of this matter. Moreover, as noted previously, the litigants in *Bush*

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2. The desire for monetary compensation is more directly expressed in the Motion to Alter or Amend Judgment which Intervenor Applicants wish to file, should their request to intervene be granted:

> "The Intervenor Applicants seek to have DuPont sanctioned for the harm it has caused these persons through its fraudulent conduct, so that the Intervenor Applicants can be made whole. Civil contempt sanctions can remedy the harm caused by contemptuous conduct. . . . DuPont swindled the Intervenor Applicants and the other *Bush Ranch* plaintiffs out of over $50 million . . . . With all due respect to the Court's imposition of a civil remedy benefitting four Georgia law schools, the $11 million to be paid by DuPont pales in comparison to the harm it caused and does nothing to aide those directly injured by its conduct. . . ."

(Mot. Intervene, Ex. 1 at 6-7.)

Ranch I who claim injury from DuPont's conduct had at their disposal other methods for remedying their injuries. Despite the broad language used in the Petition, and relied on by Intervenor Applicants as support for their Motion, this proceeding was not an appropriate forum in which to attempt to remedy all the wrongs perceived by all of the Benlate litigants. The purpose of this proceeding was to remedy a wrong done to the Court as a result of DuPont's allegedly fraudulent conduct. The Court is satisfied that any such wrongs have been remedied.

In view of all of the foregoing, the Court finds that Intervenor Applicants have failed to satisfy the necessary prerequisites for intervention. Accordingly, the Motion to Intervene is hereby **DENIED**.

SO ORDERED, this the 15 day of January, 1999.

s/ Hugh Lawson
HUGH LAWSON, JUDGE

APPENDIX C — ELEVENTH CIRCUIT COURT OF APPEALS IN CASE HERE ON APPEAL: EXCERPTS OF OPENING BRIEF OF APPELLANTS ELLIS W. LAY, *et al.* DATED JANUARY 27, 1998

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DOCKET NOS. 97-8914 AND 97-8899

ELLIS W. LAY, individually and d/b/a WINTERGREEN NURSERIES; PRINCE NURSERIES, INC., a North Carolina corporation; JAMES OLIVER PRINCE, JR.; JAMES OLIVER PRINCE, SR.; LYNN HAYES, individually and d/b/a LYNN'S NURSERIES; THOMAS O. MAHAFFEY, JR. GREENHOUSE, INC., a Florida corporation; THOMAS O. MAHAFFEY, JR.; and GEORGE S. FERGUSON and JACQUELINE D. FERGUSON, individually and d/b/a SCRUB OAK FOLIAGE; PLANTS, INC. a Texas corporation; HUNTSVILLE GREENHOUSE CORPORATION, a Texas corporation; MURPHY PROPERTIES, a Texas General Partnership; FLETCHER C. MURPHY, JR., Individually; and MARTHA C. MURPHY, individually,

Plaintiffs/Appellants,

v.

E.I. du Pont de NEMOURS AND COMPANY, a Delaware corporation; and ALSTON & BIRD, a Georgia Partnership,

Defendants/Appellees.

Appendix C

Appeal from the United States District Court
for the Northern District of Georgia

OPENING BRIEF OF APPELLANTS ELLIS W. LAY; WINTERGREEN NURSERIES; PRINCE NURSERIES, INC.; JAMES OLIVER PRINCE, JR; JAMES OLIVER PRINCE, SR.; LYNN HAYES; LYNN'S NURSERIES; THOMAS O. MAHAFFEY, JR.; GREENHOUSE, INC.; THOMAS O. MAHAFFEY, JR.; GEORGE S. FERGUSON; JACQUELINE D. FERGUSON; SCRUB OAK FOLIAGE; PLANTS, INC.; HUNTSVILLE GREENHOUSE CORPORATION; MURPHY PROPERTIES; FLETCHER C. MURPHY, JR.; AND MARTHA C. MURPHY

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January 27, 1998

Appendix C

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[vi] TABLE OF CONTENTS

	Page
Certificate of Interested Persons	i-iii
Corporate Disclosure Statement	iv
Appellants' Statement Regarding Oral Argument	iv
Appellants' Statement Regarding Certification of Type, Size and Style	v
Table of Contents	vi-vii
Table of Authorities	viii-xii
Appellants' Statement Regarding Adoption of Briefs of Other Party	xii
Appellant's Statement Of Subject Matter and Appellate Jurisdiction	xii
Statement Of Issues	1-2
Statement of the Case	2-12
A. Course of Proceeding and Disposition	2
B. Statement of the Facts	2-10
C. Standard of Review	10-12

Appendix C

Summary of the Argument 12-17

Arguments and Citations of Authority 14-50

A. Can a defendant and their attorneys perpetrate fraud against litigants in a federal court, including false statements in discovery responses, destruction of evidence, creation of false documents, subornation of perjury, and knowingly presenting false affidavits to a trial court, all during the course of litigation, in order to procure settlements for below fair value, and then subsequently use a general release procured by such [vii] fraud as a bar to a subsequent action based on that very fraud? 14-25

B. Do the subject releases apply to the instant lawsuit for fraud in the litigation process .. 25-42

1. Did Appellants intend to release their action for fraud in the litigation process 25-33

2. Does the merger clause in the release apply to the instant action 33-39

3. When Appellants affirm the settlement and sue for fraud, are Appellees allowed to use the merger clause in the settlement release as protection? 39-42

Appendix C

C. Is a fraudulently induced general release clause, used by Appellees in an attempt to bar Appellants' fraud actions, unconscionable, against public policy and therefore unenforceable 42-43

D. Can a defrauded plaintiff rescind a release without returning the settlement proceeds if the plaintiff is incapable of doing so because of the conduct of the defendant 43-44

E. Are Appellees collaterally estopped from asserting that the releases signed by the Appellants bar this action 44-48

F. Did the District Court err in failing to follow Federal Rule of Civil Procedure 12(b)(6) standards by failing to take the Appellants allegations as true and by failing to draw all inferences in Appellants' favor 48-50

Conclusion 50

* * *

Appendix C

[1] STATEMENT OF ISSUES

A. Can a defendant and their lawyers perpetrate fraud against litigants in a federal court, including false statements in discovery responses, destruction of evidence, creation of false documents, subornation of perjury, and knowingly presenting false affidavits to a trial court, all during the course of litigation, in order to procure settlements for below fair value, and then subsequently use a general release procured by such fraud as a bar to a subsequent action based on that very fraud?

B. Do the subject releases apply to the instant lawsuit for fraud in the litigation process?

1. Did Appellants intend to release their action for fraud in the litigation process?

2. Does the merger clause in the release apply to the instant action?

3. When Appellants affirm the settlement and sue for fraud, are Appellees allowed to use the merger clause in the settlement release as protection?

C. Is a fraudulently induced general release, used by du Pont in an attempt to bar Appellants' fraud actions, unconscionable, against public policy and therefore unenforceable?

D. Can a defrauded plaintiff rescind a release without returning [2] the settlement proceeds if the plaintiff is incapable of doing so because of the conduct of the defendant?

E. Are Appellees collaterally estopped from asserting that the releases signed by the Appellants bar this action?

F. Did the District Court err in failing to follow Federal Rule of Civil Procedure 12(b)(6) standards by failing to take the Appellants allegations as true and by failing to draw all inferences in Appellants' favor?

* * * *

APPENDIX D — ELEVENTH CIRCUIT COURT OF APPEALS IN CASE HERE ON APPEAL: EXCERPTS FROM OPENING BRIEF OF APPELLANTS WARREN KOBATAKE AND PLEASONTON CORPORATION IN *KOBATAKE, et al. v. E.I. DU PONT DE NEMOURS AND COMPANY, et al.*, DOCKET NO. 97-8899

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DOCKET NO. 97-8899

WARREN KOBATAKE, Individually, PLEASONTON CORPORATION, a Hawaii Corporation, MALCOLM R. SAXBY, Individually, and PUNA CERTIFIED NURSERY, a Hawaii Corporation,

Plaintiffs/Appellants,

vs.

E.I. du PONT de NEMOURS AND COMPANY, a Delaware Corporation, and ALSTON & BIRD, a Georgia Partnership Including Professional Corporations,

Defendants/Appellees.

OPENING BRIEF OF APPELLANTS WARREN KOBATAKE AND PLEASONTON CORPORATION, a Hawaii corporation,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

Appendix D

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Appendix D

[vii] TABLE OF CONTENTS

Certificate of Interested Parties and Corporate Disclosure Statement i

Statement Regarding Oral Argument v

Certificate of Type Size and Style vi

Table Of Citations ix

Statement Regarding Adoption Of Briefs Of Other Parties xiii

Statement Of Jurisdiction xiii

Statement Of Issues 1

Statement Of The Case 1

Course Of Proceedings And Disposition 1

Statement Of Facts 1

Introduction 1

Facts 6

Alta Su Testing Fraud 7

Contaminated Benlate Tests Fraud 11

Appendix D

Costa Rica Field Test Fraud 12

Standard Of Review 12

Summary Of Argument 12

Argument and Citations of Authority 16

The Release Did Not Release Defendants From The Conduct Complained of In This Lawsuit .. 16

[viii] At Worst For Plaintiffs, And At Best For Defendants, The Language Of The Release Is Ambiguous 27

The Release In This Case Does Not Contain A Bona Fide Merger Clause 35

Even If There Is A Bona Fide Merger Clause, Rescission Is Not Required 38

Conclusion 50

* * *

Appendix D

[1] STATEMENT OF ISSUES

Whether the Release released Defendants from the conduct complained of in this lawsuit;

Whether the Court below erred in determining that the language of the Release was unambiguous;

Whether the Release contains a bona fide merger clause;

Whether even a bona fide merger clause in the Release prevents Plaintiffs from affirming the Release and suing for fraud, and requires rescission; and

Whether the Court below erred in interpreting and applying the Georgia election of remedies doctrine.

* * * *

APPENDIX E — ELEVENTH CIRCUIT COURT OF APPEALS IN CASE HERE ON APPEAL: EXCERPTS FROM OPENING BRIEF OF APPELLANTS MALCOLM R. SAXBY AND PUNA CERTIFIED NURSERY IN *KOBATAKE, et al. v. E.I. DU PONT DE NEMOURS AND COMPANY, INC., et al.*, DOCKET NO. 97-8899

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 97-8899
(Consolidated with 97-8914)

Northern District of Georgia Docket Civil No.:
1:96:-cv--3417-RCF

WARREN KOBATAKE, PLEASONTON CORPORATION, MALCOLM R. SAXBY, and PUNA CERTIFIED NURSERY,

Plaintiffs/Appellants,

vs.

E.I. du PONT de NEMOURS AND COMPANY, INC., a Delaware Corporation, and ALSTON & BIRD, a Georgia Partnership,

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA
HONORABLE RICHARD C. FREEMAN, PRESIDING

Appendix E

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Appendix E

[ii] TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT ..... Page C-1 of 6

STATEMENT REGARDING ORAL ARGUMENT i

CERTIFICATE OF TYPE SIZE AND STYLE i

TABLE OF CONTENTS ii

TABLE OF CITATIONS vi

STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES xiv

STATEMENT OF JURISDICTION xv

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE 2

I. NATURE OF CASE 2

II. COURSE OF PROCEEDINGS 5

III. STATEMENT OF FACTS 5

[iii] A. *The ALTA Labs Test Data* 7

Appendix E

B. *The BAM Test Data* 11

C. *The Costa Rica Field Tests* 13

IV. STATEMENT OF STANDARD OF REVIEW 15

SUMMARY OF ARGUMENT 16

ARGUMENT 18

I. SAXBY MUST BE GIVEN AN OPPORTUNITY TO SEEK A REMEDY FOR THE WRONGS DONE TO HIM, AS IT IS UNJUST AND INEQUITABLE TO ALLOW A LITIGANT WHO HAS COMMITTED FRAUD TO PROFIT FROM ITS OWN FRAUD 18

A. *Justice And Equity Demand That Saxby Be Given An Opportunity To Seek A Real World Remedy* 18

B. *Any Clause of The Settlement Releases Interpreted to Bar Saxby's Fraud Action Would Be Unconscionable, And Thus, Unenforceable* 24

[iv] C. *Case Law Permits an Innocent Plaintiff to Bring an Action for Fraud Under the Circumstances of this Case.* 26

D. *The Real World Consequences of the District Court's Ruling Require Its Reversal.* 28

II. THE RELEASE SIGNED BY MR. SAXBY TO END HIS PRODUCTS LIABILITY ACTION DOES NOT COVER THE CONDUCT THAT IS THE SUBJECT OF THIS CASE 31

A. *The Release, By Its Terms, Released Those Claims Saxby Brought Or Could Have Brought in His Products Liability Case.* 31

B. *At Best For DuPont, The Release Is Ambiguous* 35

III. THE RELEASE DOES NOT APPLY TO THE CONDUCT ALLEGED IN THIS CASE BECAUSE IT WAS PART OF THE FRAUDULENT SCHEME ITSELF 36

IV. DUPONT IS COLLATERALLY ESTOPPED FROM CONTENDING THE RELEASE APPLY TO THE CONDUCT ALLEGED HEREIN 39

[v] V. THE MERGER CLAUSE IN THE RELEASE IS UNENFORCEABLE BECAUSE, DUE TO DEFENDANTS' FRAUD, SAXBY COULD NOT APPRECIATE THE NATURE OF THE RELEASE 41

Appendix E

A. *DuPont's Conduct Is Akin To Preventing Mr. Saxby From Reading The Release* ... 42

B. *DuPont Had Mandatory Duty Of Disclosure Which Invalidated The Merger Clause* ... 44

C. *Alston & Bird Are Not Covered by The Merger Clause.* 50

VII. RESCISSION DOES NOT REQUIRE RESTORATION IN THIS CASE. 51

CONCLUSION 54

* * *

Appendix E

[1] STATEMENT OF ISSUES

1. Will equity allow a defendant to perpetrate fraud against litigants and the courts, including lies in discovery responses, destruction of evidence, creation of false documents, subornation of perjury, and knowingly presenting false affidavits to a trial court, all during the course of litigation, in order to procure settlements for below fair value, and then subsequently use a general release procured by such fraud as a bar to a subsequent action based on that very fraud?

2. Is it unconscionable for a release to bar claims for which no consideration was paid, and which was obtained through fraud, misrepresentation and deceit?

3. Is a plaintiff who was defrauded into entering into a settlement agreement, settling his case for less than its fair value, limited to the remedy of rescission and full restoration; or may such a plaintiff elect to keep the consideration received and bring a separate action for fraud for the difference between the amount received and the fair settlement value of the case, absent the fraud?

4. Was the release signed by the Plaintiff, settling the underlying products liability cases, intended to prohibit Plaintiff from bringing the fraud, racketeering and spoilation of evidence claims set forth in the Complaint?

5. Can a release procured as part of a fraudulent scheme thereafter be used by the defrauding party as a bar to an action based on the same fraudulent scheme?

[2] 6. Is DuPont collaterally estopped from contending in this case that the release prevents plaintiff from bringing this case based upon the ruling of Judge Elliott in *In re: E.I. du Pont de Nemours and Company-Benlate Litigation*, 918 F.Supp. 1524 (M.D. Ga. 1995)?

7. Does the merger clause in the release signed by the plaintiff prevent his suit for fraud if he was either prevented from knowing the nature of his bargain and, or, the defendants violated established duties of disclosure?

8. Can a defrauded plaintiff rescind a release without returning the settlement proceeds if he is incapable of doing so because of the conduct of the defendant?

* * * *

APPENDIX F — ELEVENTH CIRCUIT COURT OF APPEALS IN CASE HERE ON APPEAL: EXCERPTS FROM REPLY BRIEF OF APPELLANTS ELLIS W. LAY, *et al.*

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DOCKET NOS. 97-8914 AND 97-8899

ELLIS W. LAY, individually and d/b/a WINTERGREEN NURSERIES; PRINCE NURSERIES, INC., a North Carolina corporation; JAMES OLIVER PRINCE, JR.; JAMES OLIVER PRINCE, SR.; LYNN HAYES, individually and d/b/a LYNN'S NURSERIES; THOMAS O. MAHAFFEY, JR. GREENHOUSE, INC., a Florida corporation; THOMAS O. MAHAFFEY, JR.; and GEORGE S. FERGUSON and JACQUELINE D. FERGUSON, individually and d/b/a SCRUB OAK FOLIAGE; PLANTS, INC. a Texas corporation; HUNTSVILLE GREENHOUSE CORPORATION, a Texas corporation; MURPHY PROPERTIES, a Texas General Partnership; FLETCHER C. MURPHY, JR., Individually; and MARTHA C. MURPHY, individually,

Plaintiffs/Appellants,

v.

E.I. du Pont de NEMOURS AND COMPANY, a Delaware corporation; and ALSTON & BIRD, a Georgia Partnership,

Defendants/Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

Appendix F

REPLY BRIEF OF APPELLANTS ELLIS W. LAY; WINTERGREEN NURSERIES; PRINCE NURSERIES, INC.; JAMES OLIVER PRINCE, JR; JAMES OLIVER PRINCE, SR.; LYNN HAYES; LYNN'S NURSERIES; THOMAS O. MAHAFFEY, JR.; GREENHOUSE, INC.; THOMAS O. MAHAFFEY, JR.; GEORGE S. FERGUSON; JACQUELINE D. FERGUSON; SCRUB OAK FOLIAGE; PLANTS, INC.; HUNTSVILLE GREENHOUSE CORPORATION; MURPHY PROPERTIES; FLETCHER C. MURPHY, JR.; AND MARTHA C. MURPHY

Appendix F

* * *

[i] TABLE OF CONTENTS

Certificate of Type Size and Style ii

Table of Citations iii

Arguments and Citations of Authority 1

I. This Case is Unique 1

II. The Policy of Deterring Fraud on the Court Overrides the Policy behind Finality of Settlement 4

III. Appellants Were Not Required to Tender Back the Settlement Amount 7

IV. The Merger Clause Does Not Apply to the Instant Action 8

V. Du Pont and Alston & Bird Confirm that the Lower Court Failed to Apply the Appropriate Standard with Regard to a Motion to Dismiss . 10

Conclusion 12

Certificate of Service

Appendix F

* * *

[2] This is not a case where the litigant alone committed fraudulent and illegal acts on the District Court and Appellants; [3] it is a case where the lawyers(officers of the Court), also participated in those activities. Since officers of the Court are involved in this action, the fraud in this action rises to a different level — to that of fraud on the District Court. This is not simply a fraud case related to the use of the Benlate product.[1] [4] This is a fraud case related to the very foundation of our judicial process.

* * * *

1. Du Pont and Alston & Bird have cited other cases that attempt to somehow use the facts in this case in subsequent unrelated cases or cases that look at the total fraudulent scheme of du Pont in the Benlate problem. Du Pont does not cite a single case where there is fraud on the very court that approved the settlement and entered the fraudulently obtained judgment, or a case against du Pont and its lawyers for undermining the judicial process. When, as here, there is fraud upon the Court perpetuated not only by du Pont, but also by its lawyers Alston & Bird, F.R.Civ.P. 60 and the established case law recognize the invalidity and consequences of those actions; they are void and offer no protection to the perpetrators. These inapplicable cases cited by du Pont and Alston & Bird include *David Matsuura, et. al. v. E.I. du Pont de Nemours and Company*, Civil Action No.: 96-01180 DAE (D.Haw. 1997); *Castleton Gardens, Inc. v. E.I. du Pont de Nemours and Company and Crawford and Company*, Civil Action No.: 97-0061-CIV-Lenard (S.D.Fla. 1997); *Foliage Forest Inc. v. E.I. du Pont de Nemours and Company and Crawford and Company*, Civil Action No.: 97-0059-CIV-Lenard (S.D. 1997); *Morningstar, Messier, Inc. v. E.I. du Pont de Nemours and Company and Crawford and Company*, Civil Action No.: 97-0065-CIV-Lenard (S.D. 1997); *Jack Martin Greenhouses, et. al. v. E.I. du Pont de Nemours and Company*, Civil Action No.: 97-0063-CIV-Lenard (S.D. 1997); *Mazzoni Farms Inc. v. E.I. du Pont de Nemours and Company and Crawford and Company*, Civil Action No.: 97-0062-CIV-Lenard (S.D. 1997); and *Ku-Bonsai, Inc. et. al. E.I. du Pont de Nemours and Company*, Civil Action No.: 97-00716 (D. Ha. 1998).

APPENDIX G — *BUSH RANCH II:* MOTION TO INTERVENE DATED JANUARY 8, 1999

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

CIVIL ACTION

NO. 4:95-CV-36 (HL)

IN RE: E.I. duPont de Nemours & Company — Benlate Litigation:

THE BUSH RANCH, INC., a Georgia corporation, and WILLIAM R. LAWSON, individually,

YELLOW RIVER GROWERS, a partnership whose partners are Roy Phillip Barber, Carol H. Barber and Gregory Phillip Barber, and ROY PHILLIP BARBER and CAROL H. BARBER, and

C. RAKER & SONS, INC., a Michigan corporation,

Petitioners,

vs.

E.I. DU PONT DE NEMOURS & COMPANY, a Delaware corporation,

Respondent.

Appendix G

MOTION TO INTERVENE

Summary of Grounds for Intervention

The Intervenor Applicants named herein move this Court pursuant to F.R.Civ.P. 24 to intervene in the above-captioned action in order to object to the *Consent Order and Final Judgment* dated December 31, 1998. The Intervenor Applicants were plaintiffs with Benlate product liability claims whose cases were consolidated and ultimately "settled" along with the Petitioners' *Bush Ranch I* cases. The Intervenor Applicants were damaged by DuPont's and its attorneys' conduct during the *Bush Ranch I* litigation as alleged in the Petition. In fact, the Petition asks this Court to "sanction" DuPont for "the wrongs committed against it and ***all plaintiffs***."

The Intervenor Applicants recently learned that the U.S. Attorney's *criminal* contempt investigation of DuPont and others pursuant to this Court's Order dated November 4, 1998 was converted into a civil proceeding and civil settlement with three of the fourteen *Bush Ranch I* plaintiffs. The Intervenor Applicants did not receive notice of the settlement until after the entry of the subject December 31, 1998 Consent Order and Final Judgment. The Intervenor Applicants' rights and interests were not protected and were not adequately represented by the parties consenting to the settlement.

Notice of Motion and Motion to Intervene

PLEASE TAKE NOTICE that pursuant to F.R.Civ.P. 24 the undersigned hereby brings the instant Motion to

Appendix G

Intervene as Petitioners for a hearing before the United States District Court for the Middle District of Georgia, Columbus Division at the United States District Courthouse in Macon, Georgia as soon counsel can be heard on a date and time convenient with this Court.

The Intervenor Applicants move for leave to intervene as Petitioners in this action, in order to object to the *CONSENT ORDER AND FINAL JUDGMENT* dated December 31, 1998 as set forth in the proposed *MOTION TO ALTER OR AMEND JUDGMENT*, a copy of which is attached hereto as Exhibit 1. The grounds for the proposed motion are set forth herein below and in the Memorandum of Law in Support of Intervenor Applicants' Motions filed and served herewith.

Grounds for the Motion to Intervene

A. ***Intervention as of Right. F.R.Civ.P. 24(a)(2).***

1. Intervenor Applicants ELLIS W. LAY, individually and d/b/a WINTERGREEN NURSERIES; PRINCE NURSERIES, INC., a North Carolina corporation; JAMES OLIVER PRINCE, JR.; LYNN HAYES, individually and d/b/a LYNN'S NURSERIES; THOMAS O. MAHAFFEY, JR. GREENHOUSE, INC., a Florida corporation, THOMAS O. MAHAFFEY, JR.; and GEORGE S. FERGUSON and JACQUELINE D. FERGUSON, individually and d/b/a SCRUB OAK FOLIAGE, PLANTS, INC. a Texas corporation; HUNTSVILLE GREENHOUSE CORPORATION, a Texas corporation, MURPHY PROPERTIES, a Texas

Appendix G

General Partnership, FLETCHER C. MURPHY, JR., individually, MARTHA C. MURPHY, individually; MALCOLM SAXBY, individually, and PUNA CERTIFIED NURSERIES, INC., a Hawaii corporation; (collectively "the Intervenor Applicants") were plaintiffs in the Benlate products liability lawsuits against DuPont consolidated for discovery purposes with the cases commonly referred to as *Bush Ranch I.*

2. The Intervenor Applicants' Benlate product liability claims were settled on virtually identical terms as those of the Petitioners.

3. The Intervenor Applicants' application to intervene is timely because it was filed immediately upon learning of the conversion of the *criminal* contempt investigation directed by this Court's Order dated November 4, 1998 into a *civil* settlement with payment of costs and attorneys' fees only to the three Petitioners as described in Paragraph 3 on Page 4 of this Court's *CONSENT ORDER AND FINAL JUDGMENT*, dated December 31, 1998,

4. The Intervenor Applicants have an interest relating to the property or transaction which is the subject of this action based on several factors including but not limited to the following:

   a. The Intervenor Applicants' Benlate lawsuits were consolidated and originally "settled" on virtually identical terms with Petitioners' *Bush Ranch I* cases.

   b. The Intervenor Applicants suffered damages identical to those suffered by Petitioners from the transactions or occurrences alleged in the Petition.

c. Paragraph 16 on Page 8 of the Petition filed March 22, 1995 specifically alleges "This Court may sanction the wrongs committed against it and ***all plaintiffs*** without setting aside those settlements, pursuant to the inherent power of this Court to impose such a condition as a part of any sanctions to be entered." (Emphasis supplied).

d. The relief sought in Paragraphs (h) and (i) on Page 10 of the Petition asks this Court issue and Order to DuPont "requiring it to show cause on a day certain why the imposition of sanctions and other relief against Du Pont should not be granted;" and for "such other and further relief be granted as this Court may deem just and equitable in the premises."

e. The statements and arguments contained in the Conclusion to the Memorandum / Appendix in Support of Petition specifically states that "A large multi-national corporation cannot hold itself above the law and act without impunity and in total disregard of the **rights of all** to be treated equally and with due process of law." (Emphasis supplied).

5. The Intervenor Applicants are so situated that the disposition of this action, as a practical matter, will impede or impair their ability to protect their interests.

6. The Intervenor Applicants' interests were not adequately protected by the existing parties to the instant action.

Appendix G

B. ***Permissive Intervention. F.R.Civ.P. 24(b)(2) (in the alternative).***

1. The Intervenor Applicants' claims and the relief sought in the Petition have common questions of law and fact.

The foregoing Motion to Intervene is accompanied with Intervenor Applicants' Motion to Alter or Amend Judgment setting forth the claim for which intervention is sought, together with a Memorandum of Law in Support of Intervenor Applicants' Motions.

CONCLUSION

The Intervenor Applicants' timely motion to intervene with supporting pleadings and memoranda satisfies the necessary burdens to intervene as a matter of right, or alternatively, for permissive intervention. Equity mandates all plaintiff-parties originally consolidated with *Bush Ranch I* and consequently injured by the transactions or occurrences set forth in the Petition have notice and equally participate in the resolution of the resulting claims and charges.

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Columbia, South Carolina
January 8, 1999

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Appendix G

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

CIVIL ACTION

NO. 4:95-CV-36 (HL)

IN RE: E.I. duPont de Nemours & Company — Benlate Litigation:

THE BUSH RANCH, INC., a Georgia corporation, and WILLIAM R. LAWSON, individually,

YELLOW RIVER GROWERS, a partnership whose partners are Roy Phillip Barber, Carol H. Barber and Gregory Phillip Barber, and ROY PHILLIP BARBER and CAROL H. BARBER, and

C. RAKER & SONS, INC., a Michigan corporation,

Petitioners,

vs.

E.I. DU PONT DE NEMOURS & COMPANY, a Delaware corporation,

Respondent.

Appendix G

MOTION TO ALTER OR AMEND JUDGMENT

Summary of Grounds for Motion

Intervenor Applicants were Benlate product liability plaintiffs whose cases were consolidated with the *Bush Ranch I* cases and who suffered damages identical to those suffered by the Petitioners from the conduct set forth in the Petition. Intervenor Applicants were not given notice of the conversion of the *criminal* contempt investigation directed by this Court's Order dated November 4, 1998 into a *civil* settlement.[1] Pursuant to the terms of the *CONSENT ORDER AND FINAL JUDGMENT* dated December 31, 1998, costs and attorneys fees are to be paid to the Petitioners who are only three of the fourteen parties damaged by the transactions and occurrences alleged in the Petition.

Without proper notice and an opportunity to participate and be heard, Intervenor Applicants are not aware of the terms of the settlement between the Petitioners and DuPont. ***All*** the parties directly affected by the alleged contemptuous conduct, including the Intervenor Applicants, should be made whole and should have an opportunity to participate in the resolution of the matters set forth in the Petition.

The Intervenor Applicants seek the following:

1. Clarification of the scope of the *CONSENT ORDER AND FINAL JUDGMENT*, including the following:

---

1. The general public's impression of this conversion is that DuPont with its' substantial financial resources purchased its way out of a charge of criminal contempt and that individuals without such resources are at a severe disadvantage.

Appendix G

A) Whether the Order bears on the rights of other parties directly affected by the Fraud on the Court and litigation fraud practiced upon them during the *Bush Ranch I* proceedings.

B) Whether the Order is intended to have collateral effect in other pending Benlate cases presently pending in other jurisdictions.

C) Whether the Order is intended to terminate the rights and/or ability of these Intervenor Applicants to bring their own action for civil sanctions.

2. An opportunity to participate and be heard regarding the terms of the settlement between the Petitioners and DuPont.

3. The Intervenor Applicants seek the imposition of civil sanctions against DuPont for its reprehensible conduct. The Eleventh Circuit Court of Appeals opinion *In re E.I. DuPont de Nemours & Company — Benlate Litigation*, 99 F.3d 363 (11th Cir. 1996), *cert. denied* 118 S.Ct. 263 (1997) did not foreclose the imposition of civil sanctions; It merely determined that the sanctions imposed by the trial court were criminal in nature.

4. In the alternative, the Intervenor Applicants seek leave to file their own Petition for civil sanctions.

Appendix G

Notice of Motion

PLEASE TAKE NOTICE that pursuant to F.R.Civ.P. 59(e) the undersigned hereby bring a Motion to Alter or Amend the Judgment for a hearing before the United States District Court for the Middle District of Georgia, Columbus Division at the United States District Courthouse in Macon, Georgia as soon counsel can be heard on a date and time convenient with this Court.

The Intervenor Applicants move to object to the *CONSENT ORDER AND FINAL JUDGMENT* dated December 31, 1998. The grounds for the proposed motion are set forth herein below and in the Memorandum of Law in Support of Intervenor Applicants' Motions filed and served herewith.

Grounds for the Motion to Alter or Amend the Judgment

1. Intervenor Applicants ELLIS W. LAY, individually and d/b/a WINTERGREEN NURSERIES; PRINCE NURSERIES, INC., a North Carolina corporation; JAMES OLIVER PRINCE, JR.; LYNN HAYES, individually and d/b/a LYNN'S NURSERIES; THOMAS O. MAHAFFEY, JR. GREENHOUSE, INC., a Florida corporation, THOMAS O. MAHAFFEY, JR.; and GEORGE S. FERGUSON and JACQUELINE D. FERGUSON, individually and d/b/a SCRUB OAK FOLIAGE, PLANTS, INC. a Texas corporation; HUNTSVILLE GREENHOUSE CORPORATION, a Texas corporation, MURPHY PROPERTIES, a Texas

General Partnership, FLETCHER C. MURPHY, JR., individually, MARTHA C. MURPHY, individually; MALCOLM SAXBY, individually, and PUNA CERTIFIED NURSERIES, INC., a Hawaii corporation; (collectively "the Intervenor Applicants") were plaintiffs in the Benlate products liability lawsuits against DuPont consolidated for discovery purposes with the cases commonly referred to as *Bush Ranch I*.

2. The intervenor Applicants' Benlate product liability claims were settled on virtually identical terms as those of the Petitioners.

3. The Intervenor Applicants have an interest relating to the property or transaction which is the subject of this action based on several factors including but not limited to the following:

   a. The Intervenor Applicants' Benlate lawsuits were consolidated and originally "settled" on virtually identical terms with Petitioners' *Bush Ranch I* cases,

   b. The Intervenor Applicants suffered damages identical to those suffered by Petitioners from the transactions or occurrences alleged in the Petition.

   c. Paragraph 16 on Page 8 of the Petition filed March 22, 1995 specifically alleges "This Court may sanction the wrongs committed against it and ***all plaintiffs*** without setting aside those settlements, pursuant to the inherent power of this Court to impose such a condition as a part of any sanctions to be entered. (Emphasis supplied).

d. The relief sought in Paragraphs (h) and (i) on Page 10 of the Petition asks this Court issue and Order to DuPont "requiring it to show cause on a day certain why the imposition of sanctions and other relief against Du Pont should not be granted;" and for "such other and further relief be granted as this Court may deem just and equitable in the premises."

e. The statements and arguments contained in the Conclusion to the Memorandum / Appendix in Support of Petition specifically states that "A large multi-national corporation cannot hold itself above the law and act without impunity and in total disregard of the **rights of all** to be treated equally and with due process of law." (Emphasis supplied).

4. The Intervenor Applicants are so situated that allowing the subject Consent Order and Final Judgment to stand, as a practical matter, will impede or impair their ability to protect their interests. DuPont bought its way out of facing charges for criminal contempt.

5. The Intervenor Applicants' interests were not adequately protected by the existing parties to the instant action.

RELIEF SOUGHT

The Intervenor Applicants seek the following:

1. Clarification of the scope of the *CONSENT ORDER AND FINAL JUDGMENT*, including the following:

Appendix G

A) Whether the Order bears on the rights of other parties directly affected by the Fraud on the Court and litigation fraud practiced upon them during the *Bush Ranch I* proceedings.

B) Whether the Order is intended to have collateral effect in other pending Benlate cases presently pending in other jurisdictions.

C) Whether the Order is intended to terminate the rights and/or ability of these Intervenor Applicants to bring their own action for civil sanctions.

2. An opportunity to participate and be heard regarding the terms of the settlement between the Petitioners and DuPont.

3. The Intervenor Applicants seek the imposition of civil sanctions against DuPont for its reprehensible conduct. The Eleventh Circuit Court of Appeals opinion *In re E.I. DuPont de Nemours & Company — Benlate Litigation*, 99 F.3d 363 (11th Cir. 1996), *cert. denied* 118 S.Ct. 263 (1997) did not foreclose the imposition of civil sanctions; It merely determined that the sanctions imposed by the trial court were criminal in nature. The Intervenor Applicants seek to have DuPont sanctioned for the harm it has caused these persons through its fraudulent conduct, so that the Intervenor Applicants can be made whole. Civil contempt sanctions can remedy the harm caused by

contemptuous conduct. *See Manhattan Industries, Inc. v. Sweater Bee By Banff, Ltd.*, 885 F.2d 1, 7 (1989). DuPont swindled the Intervenor Applicants and the other *Bush Ranch* plaintiffs out of over $50 million, as the $9.8 million for which these people settled their products liability claims was approximately 15% of their compensatory damages, and made no allowance for punitive damages. With all due respect to the Court's imposition of a civil remedy benefitting four Georgia law schools, the $11 million to be paid by DuPont pales in comparison to the harm it caused and does nothing to aide those directly injured by its conduct, the Intervenor Applicants and the other Bush Ranch plaintiffs.

4. In the alternative, the Intervenor Applicants seek leave to file their own Petition for civil sanctions, if this Court will not grant sanctions as part of this proceeding.

CONCLUSION

Based on the foregoing, the *CONSENT ORDER AND FINAL JUDGMENT* dated January 31, 1998 should be reconsidered 1) to reflect the interests of ***all*** parties, including the Intervenor Applicants, who were damaged by the conduct set forth in the Petition; 2) to clarify the intended scope of the Order, 3) to impose civil sanctions; and 4) in the alternative, the Intervenor Applicants seek leave to file their own Petition for civil sanctions.

Appendix G

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APPENDIX H — *BUSH RANCH II:* ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED NOVEMBER 4, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-9059

IN RE: E. I. DU PONT DE NEMOURS & COMPANY — BENLATE LITIGATION

THE BUSH RANCH, INC., WILLIAM R. LAWSON, Individually, YELLOW RIVER GROWERS, C. RAKER & SONS, INC., a Michigan corporation,

Petitioners-Counter-Defendants-Appellees,

C. NEAL POPE, a Georgia resident, POPE, MCGLAMRY, KILPATRICK & MORRISON, a Georgia partnership,

Counter-Defendants,

versus

E. I. DU PONT DE NEMOURS & COMPANY, a Delaware corporation,

Respondent-Counterclaimant-Appellant.

On Appeal from the United States District Court for the Middle District of Georgia

Appendix H

BEFORE DUBINA and CARNES, Circuit Judges, and FARRIS*, Senior Circuit Judge.

BY THE COURT:

For good cause, it is ORDERED that upon remand of this case to the United States District Court for the Middle District of Georgia that the chief judge of that district reassign all future proceedings in this action to a different district judge.

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* Honorable Jerome Farris, Senior U. S. Circuit Judge for the Ninth Circuit, sitting by designation.

APPENDIX I — PETITIONERS' INITIAL LAWSUITS AGAINST DUPONT: EXCERPTS FROM A COMPLAINT DATED MARCH 25, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

CIVIL ACTION FILE
NO. 93-46-COL

ELLIS WILLIAM LAY d/b/a WINTERGREEN NURSERIES, a sole proprietorship; and ELLIS WILLIAM LAY, individually,

Plaintiffs,

vs.

E.I. Du PONT de NEMOURS & COMPANY,
a Delaware corporation,

Defendant.

COMPLAINT

COME NOW plaintiffs and say:

1.

Plaintiff, Ellis William Lay d/b/a Wintergreen Nurseries, a sole proprietorship (hereinafter "Wintergreen Nurseries"), is engaged in the nursery business at a principal location in Columbus County, North Carolina, and is a citizen of North Carolina.

* * *

Appendix I

[17] 43.

More particularly, defendant's acts or omissions evidencing its willful, wanton, and/or malicious conduct and/or its conscious disregard for and reckless indifference to the consequences thereof, and a pattern or practice of intentional wrongful conduct, include, but are not limited to, the following:

(a) its misrepresentations to, and/or concealments from the Environmental Protection Agency regarding the unreasonable adverse effects of Benlate on the environment, including plant life and real property;

[18] (b) its knowing and fraudulent concealment of the inherently defective and toxic nature of Benlate;

(c) its knowing and fraudulent concealment when deleting ornamental and all dip, drench, container, and greenhouse uses from its Benlate WP (wettable powder) fungicide labels of evidence demonstrating the phytotoxicity of said formulation under certain conditions of use recommended and/or authorized by the labeling of said formulation;

(d) its knowing and fraudulent concealment of evidence regarding the conditions under which dry flowable Benlate and/or wettable powder Benlate was more likely to prove severely phytotoxic;

(e) its fraudulent attribution of all phytotoxicity induced by the use of Benlate to atrazine contamination of the fungicide;

(f) its fraudulent concealment of the likelihood and fact of atrazine contamination of Benlate during the formulation of same;

(g) its fraudulent assurances in 1989, 1990 and 1991 that product quality had been restored;

(h) its fraudulent concealment of the propensity of Benlate to cause long-term and residual damage to soils, facilities and real property;

(i) its inducement to plaintiffs not to bring suit against Du Pont, based on fraudulent misrepresentations that Du Pont intended to resolve, in good faith, all differences with plaintiffs; and

(j) its continuing attempts to knowingly, willfully and fraudulently mislead federal and state regulatory agencies and the [19] general public, including plaintiffs, exhibited by DuPont's press conference and press releases of November 5, 1992, in which Du Pont purposefully disseminated fraudulent and misleading information regarding environmental and public hazards caused by and associated with the use of Benlate DF and Benlate WP.

* * * *